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CONSIDERATIONS for CONDUCTING AN INVESTIGATION of ALLEGED CLERGY SEXUAL MISCONDUCT

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When a church official receives information which implies clergy sexual misconduct there is a duty to investigate. Failure to investigate is morally reprehensible, professionally irresponsible, and may expose the church to civil litigation.[1] An initial investigation has at least two purposes: (1) to determine if there is probable (reasonable) cause to believe that behavior has occurred which would give rise to a charge for which, if proved, the church would impose discipline and (2) to assess the spiritual and psychological needs of the parties and, if applicable, the congregation in order to provide pastoral and other necessary support.[2]

This article is written to assist people charged with investigating situations of alleged clergy sexual misconduct. Many of the suggestions can be extrapolated for use when investigating other issues of misconduct within churches. It is not a cookbook of procedures[3], but an index of concerns which ought to be considered in the course of an investigation. It is addressed to investigative teams and single investigators operating under systems where the investigator's initial function is the gathering of information. If the information gathered is sufficient to sustain a charge, the investigators either recommend an indictment (charge) or bring such indictment themselves based on their information. If the latter is the case, the role switches from that of information gatherer to prosecutor. In either case the impact that the investigation will have on any disciplinary process makes it critical ethically, if not always legally, that minimal standards of due process, for both the accuser and the accused, be respected from the outset.

The article is divided into four parts: (1) Understanding the Investigative Model (2) General Procedures (3) Talking with Witnesses, (4) Post Interview Activity. Suggestions are

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[1]This article is intended as a guide to people who have accepted responsibility as investigators of alleged misconduct in a church. It is only a guide. It does not claim to contain specific answers to particular legal problems or define the best course of action for any specific situation. The author and publishers of this article are not engaging in legal advice. If legal advice is needed, an attorney in the state where the investigation is occurring should be contacted. No warranty, express or implied, is made as to whether the materials in this article are current, correct, complete or any other thing. The article is a beginning -- answers to legal issues must be obtained through independent research and legal consultation.

[2]For full discussion of congregational concerns, see the works of Nancy Myer Hopkins published by The Alban Institute.

[3]The author has prepared a "cookbook" geared toward one denomination's polity and is available to prepare others to address specific requirements of denominational polity.

offered to help investigators maximize the quality of information gathered while being sensitive to the alleged victim, respectful of due process for the accused and considerate of the special concerns of third parties affected by the turmoil of misconduct charges.

(1) UNDERSTANDING THE INVESTIGATIVE MODEL

Church adjudicatory systems developed generations ago. Most frequently they were used to try heresy cases. A finding of guilt usually resulted in excommunication, the ecclesiastical equivalent of capital punishment. The adjudicatory procedures of many denominations continue to reflect their historical roots in the heresy trial. They are more analogous to the criminal justice system than to civil court procedures, even when the charge is one which, outside the church, would be brought in a civil rather than criminal court. For example, most denominations require the prosecutor to prove charges by the criminal standard of "beyond a reasonable doubt." By contrast, "preponderance of the evidence" is the standard of proof in the overwhelming majority of civil cases. [A few select issues, such as termination of parental rights, require the intermediate standard of "clear and convincing evidence" which is also common in labor arbitration.] Some denominational procedures further require protections for the accused that would not be necessary under secular civil or criminal process [for example a *Miranda* type warning before being formally charged or when not in custody.]

An investigator's first challenge is to understand and to observe the requirements of both the particular denomination's polity and the minimum requirements of the secular system. While most charges brought within church systems are settled within those systems, either informally or through ecclesiastical adjudication, more egregious behaviors may lead to criminal prosecution or civil litigation in state courts. Church investigators need to be careful not to do anything which would interfere with the state's investigation or have the appearance of tampering with witnesses or evidence.

The grand jury, used in the federal system and in some states to investigate criminal behavior, is a useful model with which to compare a typical church investigation. A grand jury decides whether or not to issue an indictment against a person based on the testimony it receives. Its hearings are somewhat analogous to the collection of data by church investigators in many denominations. An investigation is initiated because someone has alleged behavior which violates a law. If the investigation reveals probable cause to believe the behavior occurred, an indictment setting forth the charges is handed down which leads to a trial to determine guilt or innocence. It is vital to understand where secular and ecclesiastical investigative systems may differ. Do not

assume that the secular procedures apply to all denominations. In the grand jury system, the accused has no opportunity to defend during the investigative stage. The accused must appear before the jury if called; his or her *Miranda* rights (right to remain silent and to have counsel present) are not given. However, if the accused wishes to invoke the Fifth Amendment privilege against self-incrimination, he or she cannot be forced to testify on the issue to which objection is raised. Counsel for the accused is not allowed to be present at the hearing. Unless the person is required to appear before the grand jury, the accused has no right to know that he or she is the subject of an investigation.

Few denominations employ these rules stringently. Most apply some and adapt others. Investigators must understand and follow the rules of their church polity. If the rules are not followed, an accused who believes his or her rights under church law have been abused by the church, may appeal the outcome of the process to the civil courts. Courts are reluctant to interfere with the internal affairs of religious organizations. However, they may require churches to follow their own stated processes when reaching decisions that affect the economic livelihood or professional reputation of an accused. Appeals by the accused to a secular court, regardless of their outcome, produce costly litigation and continue to perpetuate the wounds of an embattled congregation. The importance of knowing, understanding, and observing polity during an investigation cannot be stressed enough.

II. GENERAL PROCEDURES

When interviewing a witness, the goal is to obtain as much information about the situation as that person is capable of sharing. It is vital to pose questions in a way that encourages the person to participate fully in the process. Questioning must be done so not to bias the information obtained. If care is not exercised, the way a question is phrased can pre-determine an answer. The tone of voice or facial expression of a questioner can influence witnesses to clam up and be evasive or to tell their stories openly. Likewise, a gentle, non-judgmental offer of spiritual support or psychological counseling may encourage its acceptance where as a "strong recommendation" can be resisted as coercive. A basic understanding of active listening skills is critical for any investigator. Each investigator ought further to be familiar with the substantive concerns of the issue under investigation. For example, in cases of clergy sexual misconduct, each investigator should be aware of the dynamics of abuse of power within relationships of trust: the common profiles of professionals who abuse their authority and the special life circumstances and vulnerability of those who allege abuse. How institutions respond to allegations of misconduct as

well as how third parties affected by the charges express their doubts and hurt are also vital to understand.[4]

If there are criminal charges, the public authorities should be notified. Both the accuser and accused should be advised to obtain legal counsel. (The investigators also may want to consult counsel before proceeding) In the case of rape allegations, the victim, if not a minor, usually should determine whether or not authorities are notified. An investigator receiving allegations of child sexual abuse ought to consult local legal counsel immediately about mandated reporting statutes.

If the church's process calls for a team investigation, no fewer than two persons can conduct any interview. (In rare instances, a victim may feel unable to tell the story to more than one person and this should be respected). At least one investigator should be of the same gender as the alleged victim. Investigators should meet before each session to determine what information is being sought from the particular witness, the order of questioning, who will lead the questioning, who will keep notes. For continuity of rapport, it may be useful to have one investigator ask most of the questions with the other investigator(s) keeping notes and interposing only for clarification. Never play the adversarial "good cop - bad cop" game as a questioning strategy. Usually, it is best to let witnesses tell their stories completely, in their own words and in whatever order they choose, before interrupting with questions. This is especially important for victim-accusers. At the conclusion of each interview, give witnesses the name, address and phone number of an investigator whom they may contact should they have further information to share.

Interviews should be held in a neutral space (not the office of the accused clergyperson or the site of the alleged abuse). The interview room should be comfortable and assure privacy for uninterrupted conversation (not a large church function room with multiple doors and stacks of folding chairs!). Interviews usually should be conducted with only one witness at a time and witnesses should be encouraged not to discuss their interviews with each other. Witnesses should never be kept waiting as a group -- offer separate waiting areas and sufficient time between interviews that witnesses do not meet each other coming and going. If possible, provide a "monitor" for the waiting areas to greet witnesses and to insure that discussion about the interviews does not occur.

Most church investigative proceedings are not done under oath. At no time should anyone

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[4]See Fortune, Marie. *Is Nothing Sacred? When Sex Invades the Pastoral Relationship*, San Francisco: Harper and Row, 1987; Hopkins, Nancy Myer. *The Congregation is also a Victim* and *Clergy Sexual Misconduct: A Systems Perspective*. The Alban Institute, 1993; Lebacqz, Karen and Barton, Ronald. *Sex in the Parish*, Louisville: Westminster/John Knox, 1991; Rutter, Peter M.D. *Sex in the Forbidden Zone*, Los Angeles: Jeremy Tarcher, Inc. 1989.

investigator can make his or her own copy of any tape. Tapes are confidential but subject to subpoena in state courts the same as notes. The party-witnesses should be allowed to have a copy of the team's tape of their own interview if requested. No witness should be given a copy of another witnesses' tape. Non-party witnesses should not be allowed to make their own tapes or to have copies of the team's tape of their interviews. If taping, an investigator should turn the tape on as soon as everyone is in the room. On the tape note the date, time, place, persons present and everyone's awareness that the interview is being taped. At the interview's end, note the termination time. Tapes should be carefully labeled and safely stored.

(3) TALKING WITH WITNESSES

Three categories of witnesses may be interviewed: the accuser (who usually will also be the victim), the accused, and non-party witnesses. At the investigative stage, only people with direct knowledge of circumstances surrounding the allegations should be interviewed. This is not the time to involve members of the congregation generally. For example, if there is a congregant who the accuser believes has experienced a similar situation and is willing to talk, that person may be seen. Or if there is a church employee who had occasion to observe any of the alleged behavior patterns, that person should be seen. Church members should not be interviewed simply as "character witnesses" for either the accuser or the accused or to "take the temperature of the congregation." Congregational involvement will come later when the disciplinary process has formally begun, or when allegations have been dismissed, should it be necessary to involve the congregation in a healing process. The basic format of each initial interview is as follows:

I. Introduction of Investigators
II. Statement of Rights to the Accused (according to denominational polity)
III. Prayer (optional)
IV. Explanation of the Process
V. Witness's Opportunity to Ask Questions about Process
VI. Clarification of Alleged Problem
VII. Witness's Opportunity To Tell The Story
VIII. The Questioning
IX. Witness's Opportunity to Ask Questions
X. Closing

I. Getting Started and Introduction of Investigators

Investigators must assume a wholly neutral position regarding the truth of the matter which is under investigation. Do not begin by saying to the accuser, "We are sorry you have suffered this harassment and we hope that Rev.White will soon be punished for his misconduct." Do say, "We understand this is a very difficult time for you and your family. Engaging in this process takes great courage. We will do our best to be sensitive to your concerns as we proceed with this investigation."

Do not begin by saying to the accused, "We are sorry these allegations are being made; we believe that they are probably unfounded and that you are innocent." Do say, "We understand this is a very difficult time for you and your family. We will do our best to be respectful of your concerns as we engage in this investigation."

Do not begin by saying to non-party witnesses, "It looks like you have a real mess in this church. Things have really gotten out of hand with all these allegations and Rev. White's ignorance of proper behavior." Do say, "We understand this is a very difficult time for the church community. Participating in this process takes great courage for everyone. We will do our best to be sensitive to the concerns of everyone as we undertake our investigation."

Introductions should be brief -- each investigator's name and home church. To set a tone of cordiality, investigators may want to shake hands with the witness during the introduction. If the profession of a doctor, attorney, clergyperson, or therapist is identified, the witness must know that the person is not there in his or her professional capacity. Such professions often carry in state courts client privilege for communications. However, no privilege applies to the inquiry because the witness is not a client.

II. Statement of Rights to the Accused

Departing from the grand jury model, some denominations require that investigators inform the accused that he or she has the right not to answer questions and to have an attorney. If denominational policy calls for this, the accused must be reminded of the right before every contact during which information will be given.

III. Prayer

Prayer customarily opens the gatherings of many faith communities. Investigators may honor this practice if they first determine from the witness that she or he is comfortable engaging in prayer. Some victims of clergy sexual abuse will find being ask to participate in a prayer extremely discomforting and in these instances a prayer should not be offered. When prayer is desired by the

witness and investigators, great care must be exercised in its wording. It is easy to be unintentionally coercive or inadvertently judgmental in the language of prayer. A prayer asking for reconciliation and healing could imply to the accuser that those ought to be his or her immediate response to the situation rather than pursuing an allegation. Avoid language which makes any reference to the role of any party, implies any judgments about the truth of the matter under investigation, the "duty" of any party to offer forgiveness or seek forgiveness through confession. An investigator should offer the prayer, never the witness.

IV. Explanation of the Process

While the content of an investigation cannot usually be shared with all witnesses, the process can. Witnesses need to know something about the "disruption" in the life of their faith community. Information shared reduces anxiety and lets the accuser and accused know allegations are being taken seriously and treated according to denominational procedures. Information which can be given by an investigator includes:

(1) When the investigators were contacted and by what level of church authority;

(2) How investigators were selected;

(3) A rough schedule by which the investigators intend to accomplish their work -- when reports should be completed, and to whom the reports will be given;

(4) How records will be kept and how they will be used. It is important to understand the meaning of confidentiality. Many church processes use the term "confidential" in reference to the notes and discussions of investigators and witnesses. "Confidential" in this context means that no one will discuss the investigation outside of the proper channels as determined by the church. Likewise, notes, tapes, reports and other information will not be shared with anyone other than persons determined by the process to have legitimate access. "Confidential" does *not* mean that the discussions or information generated are "privileged" in state courts. If there should be a trial conducted in a state judicial system, the material would likely be subject to subpoena and disclosure. Denominational policies govern what is and is not privileged in church adjudicatory proceedings.

(5) If the accuser or accused has brought an attorney or support person (non-party witnesses should not bring either), the role of that person should be clarified. The role of an attorney or a support person is similar: she or he is there to give advice and emotional support to the witness. He or she should not be asked questions nor be allowed to give direct answers to the investigative team. If an attorney or support person tries to manipulate the process, she or he should be reminded of the advisory role. An attorney may advise the witness not to answer

questions and that can be noted in the report. A support person or attorney may appropriately ask, on the witness' behalf, for a breather to collect thoughts or give advice privately.

If a circumstance arises where a non-attorney support person appears to be attending the questioning in order to spread information outside the process, interfere with the investigation or exacerbate the situation within the community, the witness may be asked to dismiss that person and find someone whose only agenda is to support the witness. The team cannot ask a witness to dismiss an attorney; they can ask the witness to instruct the attorney to be respectful of the guidelines.

(6) If provided by the church policy, the witness should be informed that the investigators can make recommendations for pastoral care. Witnesses should be encouraged to make known any need for such assistance now or at any other time to the investigators. It is particularly important to take requests for support by an alleged victim seriously and act upon them expeditiously. If either the accuser or accused seek psychological counseling, it should be from a licensed professional whose client privilege is recognized by the state courts.

(7) If criminal allegations are present, the secular authorities should be notified. Both the accuser and the accused should know this and be advised to seek their own local legal counsel for advice. If an adult victim is alleging rape, he or she should usually control if and when the authorities are notified. Cases of child abuse should always be reported in accordance with the local laws.

(8) The overall outline for the particular interview should be given, noting that the group has just completed the Explanation of Process.

V. Witness's Opportunity to Ask Questions about the Process

This is the opportunity to clarify questions about the basic procedure just described and to address any "housekeeping" matters such as coffee or meal breaks, location of phones, restrooms, etc. It is not the time for the witness to address the substantive issues of the meeting.

VI. Clarification of the Problem

The victim-accuser should be read the allegations as presented to the investigator and asked if they are correctly stated. While the full story will be shared shortly, this is the opportunity to clarify the nature of the allegations (verbal sexual harassment, physical assault, inappropriate counseling behavior. etc.) The accused will be given only limited information as prescribed by the denomination's policies or other investigative needs. Details and specific allegations should be shared very selectively, if at all, with the accused. Allegations and specific information should not

be shared with non-party witnesses. A typical statement about the investigation to a non-party witness might be:

"We are here to investigate concerns that Rev. White may have engaged in behavior that some people found to be in conflict with their perceptions of the role of a minister in this church." If a non-party witness tries to ferret out the details, say, "Until the fact-finding body has determined the truth of the concerns, we cannot share the information you seem to be seeking. We ask that you trust our process and work with us in focusing the attention of this congregation on healing tasks rather than engaging in speculation and gossip about the situation."

VII. Opportunity for Witness to Tell The Story

The witness needs an opportunity to tell her or his story to the investigative team. Let the witness talk without interruption giving the details in whatever fashion she or he chooses. The investigator can "put it all in order" during later questioning.

This phase is important for several reasons: both the accuser and the accused may reveal new information which corroborates, complements or contradicts previous information as they set forth their stories. Secondly, it is an opportunity for the investigator to ascertain if a non-party witness is biased or has a pre-conceived judgement about the situation. Finally, it is important for each witness to engage in some emotional venting. Listen emphathetically while the witness airs her or his feelings about what has transpired. As the witness speaks, keep in mind the psychological impact of sexual abuse on a victim-accuser, the emotional difficulties of bringing an action, the typical response mechanisms of abusers; and the anger, denial and distrust responses to conflict within congregations. Without commenting on the truth of the matter asserted, investigators can validate the witness's need to be listened to with respect and compassion.

VIII. The Questioning

Questions should elicit information on which the determination of whether or not to file charges can be made. Questions must provide a sense of the credibility of the witness as well as his or her capacity to know the particular situations he or she describes. Questions usually should be open ended, rarely leading and never suggesting a response. Investigators should pose questions in a way that makes the witness the center of attention -- it is the witness' views and emotions which must be elicited. A recital of the views of another witness or of an investigator is not appropriate.

Some basic questions should be thought out and written down in advance. This should not preclude asking spontaneous follow-up questions during the interview. Begin by asking orienting

questions: how long the witness has lived in the community, been part of the local church, etc. A few general questions put the witness more at ease with the process while providing background information about the community and witness. The next questions should elicit a description about the scene of the alleged problems. If a clergyperson allegedly committed sexual misconduct in her or his office during counseling, have witnesses describe the use and proximity of that office to other church offices. Are doors to offices customarily left open or closed when in use? What are normal office hours and how many people are in the building during those hours? Are night time appointment usual? How does one arrange an appointment with the minister and other church staff? Who keeps records of appointments?

Other questions seek descriptions of the relationship between the parties. When talking with the accuser, find out how the accuser viewed the accused before the alleged behavior occurred -- what was perceived as normal between them. Ask the accused to describe a normal relationship with a counselee. Have both describe a typical counseling session. After enough questions have been asked to identify the relationship of the accuser and the accused, questions specific to the allegations can begin. Issues raised may be very difficult and embarrassing for the parties to discuss. Be sensitive and allow pauses and tears as they need to happen.

Be extremely careful to keep the questions open-ended, non-argumentative, and non-directive. "Jane, please tell us about any physical contact that may have occurred between you and Rev. White." (Not, "Did Rev. White kiss you on the mouth during counseling?")

If the accuser claims specific conduct was committed, the investigator needs to inquire about that conduct including specific data regarding times, dates, exact descriptions of who did and said what to whom and any possible corroborating evidence."Jane, how did Rev. White kiss you?" "Where were his hands?" "How many times did he kiss you?" "Did you respond?" "How? "Did you say anything? "What?" "Did he react to your response?" "How?"

A statement, "I spent the night with Rev. White," does not allege that sexual intercourse occurred. If the accuser makes that statement, the investigator must ask, "What happened during the night?" If the accuser implies intercourse, ask directly, "Did sexual intercourse occur?"

If there are items of physical evidence (letters, appointment calendars, phone records, hotel bills, credit card statements, tapes from answering machines) which document events, ask to have copies and advise the witness to keep the originals or to give them to her or his attorney for safe-keeping.

To the accused, the questions can be vague as to the particulars (victim's name, dates, places) on which the allegations are based but should seek information about similar behaviors. "Rev. White, have you ever had any physical contact with a counselee?" "Describe it." "Rev.

White, have you ever spent the night with a counselee and had sexual intercourse with her?"

The purpose of questioning is to gain information which sheds light on the situation. With care, the questions can elicit further details which may substantiate or contradict the initial story. It is vital to question in such a way that the witness does not feel "put on trial" or cross-examined or doubted. If the witness says something that makes no sense in light of other information or which seems contradictory, ask the witness to re-phrase the answer. It is not necessary or desirable always to confront the witness with obvious discrepancies. Note them for the report and ask careful follow-up questions that may be used to evaluate the discrepancy.

The witness may well be nervous, highly emotional, unable to remember specifics, and have a generally difficult time expressing him or herself during the initial interview. In most instances, investigators will want to ask the accuser and accused to return for second interviews at which time they will be more at ease and have had time to remember items which need to be related. During the second interview, an investigator can ask further questions based on information gathered from talking with other witnesses. The questions while based on information from other witnesses should not directly indicate the source or the exact material.

IX. Witness Asks Further Questions and Makes Summary Statement

After the investigators have completed questioning, the witness should be asked if there are further questions about the process, be given the opportunity to add any information he or she thinks should be reported, and to make summary comments.

X. Closing

It is important to ask the witness again if there is anyone else in particular whom the investigators ought to contact. Without implying the ability to achieve a particular result, investigators should also ask: "What would you most like to have happen as a result of our conversation?" and "If we could recommend any help that you might want or any particular response to your situation, what would it be and who would it involve?" The offer of pastoral care and a reminder to consult legal counsel if appropriate may again be reiterated. Thank the witness for his or her cooperation and shake hands if it seems appropriate. If a closing prayer is used, (and it should not be suggested if the witness expressed discomfort at the offer of an opening prayer), it should be carefully worded and be offered by an investigator, not the witness.

(4) POST INTERVIEW ACTIVITY

Once all interviews are complete, investigators must decide how to present the information. Reports written by committees are often confusing and internally inconsistent. Therefore, one person should compile the final report in draft and circulate it among the other investigators for comments. Should a party or witness provide additional information after the interviewing process is completed, that information should be confirmed in writing and shared with all participating investigators. No additional information should be accepted by the investigators after the report is filed. Church polity should advise where such information should be channeled. If the investigation produces probable cause that an offense has occurred, some denominations convert the investigators into prosecutors; others pass the investigative report onto another body to bring charges. Whichever occurs, those who served as investigators have completed that task. Their report will form the basis for adjudicatory activity whether formal or informal resolution is sought. An investigation done with respectful care to procedural detail can ensure that the recommendations of the report withstand scrutiny and challenge in an ecclesiastical or secular court. A good investigative report will also offer the basis for effective and caring pastoral response to the parties and the congregation. Pastoral care will be needed whether or not charges are brought: no one, including most investigators, endures the rigors of an investigation without emotional trauma.

All people embarking on this task, whether lay or clergy, whether occasional volunteers or professional investigators, need to be aware of the critical psychological, spiritual and legal dimensions of this work. Investigators should have a basic understanding of the denomination's disciplinary process, its adjudicatory procedures, the range of remedies available through the church (informal measures such as mediation, counseling and education through formal arbitration, adjudication and discipline or dismissal from the ministry); active listening skills; common profiles of abusers and victims; as well as relevant state laws and their applicability to church investigations and adjudicatory processes. Some denominational insurance carriers provide training information, as will this author. No one should be asked to assume the responsibility of being an investigator without some thoughtful training from the local church or denomination.